



THE STATE  
of **ALASKA**  
GOVERNOR BILL WALKER

## Department of Transportation and Public Facilities

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December 9, 2014

Edward J. Kowalski  
U.S. EPA Region 10  
1200 Sixth Avenue, Suite 900  
Seattle, Washington 98101-3140

Re: EPA Consent Decree, Case No. 3:10-cv-00115-JWS, AGO No. AN2013104183

Dear Mr. Kowalski:

ADOT will pay the \$261,000 in stipulated penalties accrued through December 31, 2012. ADOT will also pay \$40,250 in stipulated penalties that accrued through September 22, 2013, the date we requested termination of the Decree. The total payment for penalties through September 22, 2013 will be \$301,250. ADOT will pay this amount to the U.S. within 15 days of EPA petitioning the Court for termination of Sections III, IV, VI, VII, and X (a – k) of the Consent Decree, in accordance with paragraph 41(a) and 41(b).

ADOT would prefer to pay the \$301,250.00 at this time, but due to EPA's previous unresponsiveness and delay tactics, ADOT has no confidence that EPA staff will engage in substantive and timely discussions regarding termination. ADOT continues to incur significant costs, unrelated to stipulated penalties or enforcement of the Construction General Permit (CGP), due to EPA's non-compliance with Decree conditions. For the record, ADOT has made all previous agreed upon payments on time, and in full.

ADOT requested termination more than a year ago, and EPA continues to ignore the request. At that time, EPA demanded stipulated penalties through 2013, and indicated that termination would not be on the table until ADOT paid the penalties. Now that EPA has revised its penalty demand, and ADOT has agreed to pay penalties through the requested termination date, it is time to move for termination.

Your letter says that EPA will not consent to termination of Section III "prior to ADOT coming into compliance with its obligations." Termination is important to Alaska, and EPA needs to define compliance. The letter also says that ADOT did not achieve its agreed-upon obligations under the Consent Decree in 2014, citing the written endangerment reports. EPA must be referring to Section III.9(a). How is ADOT out of compliance with this paragraph? The fact that ADOT submitted endangerment reports in 2014 is not evidence of non-compliance with the

Consent Decree, but rather strict conformance with provisions of the CGP and the Consent Decree. EPA appears to have a predetermined decision searching for a justification.

In letters and in our meeting last February, EPA has said that ADOT must be "in compliance" with the Decree before EPA will agree to termination. But EPA has not been willing to have a frank discussion about what "in compliance" means. ADOT was in substantial compliance with the Decree on September 22, 2013, and it is in substantial compliance with the Decree today. There will always be instances of non-compliance with the Decree (for so long as it is in effect) as well as the CGP. ADOT was 98% compliant with the Decree in 2013, and we are proud of that accomplishment. With over 100 projects across the state at any given time, and the number of opportunities for reporting and other errors, ADOT and its contractors achieved a phenomenal success rate. I challenge any program or agency to achieve that level of compliance, especially in an industry of such contractual complexity, level of risk for loss of human life, large geographic area, and direct susceptibility to weather extremes. To hold ADOT to a zero error rate is not reasonable. EPA's revised demand for stipulated penalties shows that you agree.

The Decree contemplates its own termination in paragraph 41. Clearly the parties intended that it would terminate after three years, otherwise paragraph 41 would not exist. We have now passed year four! The Decree does not intend for the EPA to hold ADOT's termination request hostage over instances of non-compliance that happened long after ADOT's termination request as of September 22, 2013, and to refuse to discuss under what circumstances EPA will agree to termination.

The parties intended the Decree to be a tool to bring ADOT and its contractors into substantial compliance with the Clean Water Act. ADOT and its contractors have done that. I look forward to having a concluding and reasonable conversation with you about termination by January 10, 2015. Otherwise, EPA leaves ADOT with little choice than to have the Court define compliance, as EPA is kicking their obligation down the road, and letting the Alaska public pay the price. As a final note, it has not gone unnoticed that EPA terminated a related consent decree with the private entity (Granite) that were in fact the party substantially responsible for the original violations and had an endangerment report during their related consent decree, but will not terminate the decree that is costing the citizens of Alaska considerable public monies.

I would appreciate your call. My number is (907)465-6958.

Sincerely,



Roger Healy,  
Chief Engineer, P.E.